

SERVICE DATE - AUGUST 9, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-33 (Sub-No. 172X)

UNION PACIFIC RAILROAD COMPANY—ABANDONMENT EXEMPTION—IN  
MARSHALL COUNTY, KS

Decided: August 5, 2004

By petition filed on April 21, 2004, the Union Pacific Railroad Company (UP) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 5.30-mile line of railroad known as the Vliets Industrial Lead, extending from milepost 409.10, near Frankfort, to milepost 403.80, near Vliets, in Marshall County, KS (the line). Pursuant to 49 U.S.C. 10502(b), the Board served and published a notice in the Federal Register (69 FR 26209) on May 11, 2004, instituting an exemption proceeding. The exemption will be granted, subject to environmental and standard employee protective conditions.

BACKGROUND

There are currently no shippers located on the line, and there is no overhead traffic. According to UP, present development trends in Marshall County make it unlikely that any new rail users will locate in the area of the proposed abandonment. The last active customer on the line was Beattie Farmers Union Cooperative Association (Beattie Coop), which received 2 cars of fertilizer in January 2003, and the same number of cars of fertilizer in 2002. Beattie Coop has since relocated and is receiving fertilizer at another track in Frankfort, served by UP from its Kansas Subdivision. UP states that Beattie Coop does not oppose the proposed abandonment.

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without our prior approval. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving UP from the

costs of owning and maintaining an unused line of railroad [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. It appears that Beattie Coop, the last active shipper on the line, does not oppose the exemption and has relocated its receiving operations to another rail line served by UP. Nevertheless, to ensure that Beattie Coop is informed of our action, we will require UP to serve a copy of this decision on Beattie Coop within 5 days of the service date of this decision and certify to us that it has done so. Given our market power finding, we need not determine whether the proposed abandonment is limited in scope.

Under 49 U.S.C. 10502(g), we may not use our exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition of granting this exemption, we will impose the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979).

UP has submitted an environmental report with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed action. See 49 CFR 1105.11. The Board's Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on June 18, 2004. Comments to the EA were requested by July 19, 2004.

In the EA, SEA has noted that the Kansas Department of Agriculture (KDA) indicates that if the project involves the construction of any facility, levee, floodplain, fill, or other structure which controls, regulates, or changes the flood waters of a stream or watercourse, it will require plans for the project to be approved by the Chief Engineer of the Division of Water Resources prior to construction, and that if it includes the construction of a dam, or changes or diminishes the course, current, or cross section of a stream or watercourse, it will require the issuance of a permit and approval by the Chief Engineer. Accordingly, SEA recommends that prior to commencement of any salvage activities on the line, UP contact the Chief Engineer of the Division of Water Resources at KDA to address the concerns regarding the construction of levees and dikes or drainage projects.

SEA has also noted in the EA that the U.S. Department of Interior, Fish and Wildlife Service, Kansas Field Office (USFWS), has suggested that UP keep the right-of-way in a natural condition for the benefit of native wildlife, plants, and the public. Accordingly, SEA recommends that UP contact USFWS prior to commencement of any salvage activities on this project.

Finally, SEA had noted in the EA that although the State of Kansas Department of Wildlife and Parks (Kansas DWP) reported that the proposed abandonment would have no significant impact on crucial wildlife habitats or public recreational areas, the assessment report is several years old, and Kansas DWP's recreational land obligations and the state's species listings periodically change. Accordingly, SEA recommended that UP contact Kansas DWP prior to commencement of any salvage activities to verify the continued applicability of its 2001 assessment report. However, by letter dated June 30, 2004, Kansas DWP stated that it has further reviewed the project and determined that the proposal would have no impact on crucial wildlife habitats or public recreational areas. Therefore, SEA now recommends that no consultation condition be included.

No other comments to the EA were filed by the due date. Accordingly, the conditions pertaining to KDA and USFWS recommended by SEA in the EA will be imposed. The proposed abandonment, as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

SEA has indicated in its EA that, if abandonment and salvage of the line does take place, the right-of-way may be suitable for other public use. Public use requests were due no later than 20 days after publication of the notice of the petition in the Federal Register, or by June 1, 2004. No one has sought a public use condition, and none will be imposed.

It is ordered:

1. Under 49 U.S.C. 10502, we exempt from the prior approval requirements of 49 U.S.C. 10903 the abandonment by UP of the above-described line, subject to the employee protective conditions set forth in Oregon Short Line R. Co.—Abandonment—Goshen, 360 I.C.C. 91 (1979), and subject to the conditions that UP shall: (1) contact the Chief Engineer of the Division of Water Resources at KDA to address the concerns regarding the construction of levees and dikes or drainage projects prior to the commencement of any salvage activities; and (2) contact USFWS prior to commencement of any salvage activities on this project.

2. UP is directed to serve a copy of this decision on Beattie Coop within 5 days after the service date of this decision and to certify to the Board that it has done so.

3. An offer of financial assistance (OFA) under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by August 19, 2004, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,100. See 49 CFR 1002.2(f)(25).

4. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

5. Provided no OFA has been received, this exemption will be effective on September 8, 2004. Petitions to stay must be filed by August 24, 2004; petitions to reopen must be filed by September 3, 2004.

6. Pursuant to the provisions of 49 CFR 1152.29(e)(2), UP shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by UP's filing of a notice of consummation by August 9, 2005, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams  
Secretary